85-821

No.

Supreme Court, U.S.
FILED
NOV 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

In the matter of: STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, STATE OF FLORIDA, DEPARTMENT OF REVENUE, STATE OF FLORIDA, and THE CITY OF TAMPA, FLORIDA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR and DONALD P. HODEL, SECRETARY OF THE INTERIOR, and SEMINOLE TRIBE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL BY THE UNITED STATES MIDDLE DISTRICT COURT OF FLORIDA WHICH DECISION IS IN CONFLICT WITH THIS COURT'S HOLDING IN LAND V. DOLLAR, 330 U.S. 731 (1947), THE ELEVENTH CIRCUIT'S HOLDING IN EATON V. DORCHESTER DEVELOPMENT, INC., 692 F.2d 727 (11th Cir. 1982), FLORIDA DEPARTMENT OF STATE V. TREASURE SALVORS, INC., 458 U.S. 670 (1982) and ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATION, INC. V. CAMP, 397 U.S. 150 (1970).

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OPINIONS BELOW

The opinion of the United State Court of Appeals for the Eleventh Circui for which review is sought is reported a 768 F.2 1248 and is reproduced a Appendix A, infra, page 3a.

The opinion of the United State District Court for the Middle District o Florida is unreported and is reproduce at Appendix A, infra, page 1a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit for which review is sought is reported at 768 F.2d 1248 and was rendered on August 16, 1985. No petition for rehearing was filed. The jurisdiction of this Court is invoked under the provisions at 28 U.S.C. Section 1254 (1979).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment XI
Suits Against States

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

5 U.S.C. § 701. Application; definitions

> (a) This chapter applies, according to the provisions thereof, except to the extent that -
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

42 U.S.C. § 1996. Protection and preservation of traditional religions of Native Americans

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and

and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignemnt, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the

exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 C.F.R. § 1.2 Applicability of regulations and reserved authority of the Secretary of the Interior.

The regulations in Chapter I of Title 25 of the Code of Federal Regulations are of general application. Notwithstanding any limitations contained in the regulations of this Chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.

25 C.F.R. § 151.10 Factors to be considered in evaluating requests.

In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additioal land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for the individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the rax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

STATEMENT OF THE CASE

On January 22, 1982, Petitioners filed a complaint in the United States District Court for the Middle District of Florida seeking declaratory and injunctive relief against the United States Department of Interior and its Secretary. The controversy concerns the propriety of the Department's taking title to certain lands in Hillsborough County, Florida, in trust for the Seminole Tribe of Florida under the provisions of 25 U.S.C. Section 465 (1934), 42 U.S.C. Section 1996 (1978) and 25 C.F.R. Section 151 (4-1-85), formerly known as 25 C.F.R. Section 120a. Jurisdiction of the Middle District Court of Florida was invoked pursuant to 28 U.S.C. Section 1331, 1361 and 5 U.S.C. Section 702.

In 1980, the City of Tampa was excavating certain downtown property in preparation for constructing a parking facility. On that site, human remains and artifacts were discovered dating to the 1800's. Archaeological review indicated that some of the remains and artifacts found belonged to persons of Indian ancestry. Based on an agreement between the City of Tampa and the Seminole Indian Tribe, the Seminoles were to secure another site in Hillsborough County on which to re-inter these remains and on which a cultural museum would be built to display the Indian artifacts.

The Seminoles acquired the property located at I-4 and Orient Road in Hillsborough County. This land has never been asserted to be sacred to the Indian religion or necessary for worship or the

performance of any sacred rites. After acquiring title to this property, the Seminoles petitioned the Secretary of the Interior to accept such land in trust for the Seminoles. In that petition, the Seminoles represented that the use of the land would be for the interment site of the Indian remains, a cultural museum for the Indian artifacts found at the excavation site and related activities.

Petitioners have alleged the Secretary exceeded his authority by granting trust status to the Hillsborough property. The Secretary failed to require the Seminoles to comply with the provisions of 25 C.F.R. 151 (4-1-85) (formerly 25 C.F.R. 120a).

Immediately following the acquisition of the Hillsborough County property "in trust" for the Seminoles,

the Seminoles used the property for the operation of a smoke shop, a retail shop selling cigarettes tax free to the non-Indian general public. These operations commenced prior to the Seminoles acquiring the remains and artifacts found at the downtown excavation site. The Seminoles at such smoke shops are not reporting and/or paying cigarette taxes levied pursuant to Chapter 210, Florida Statutes, nor sales tax levied pursuant to Chatper 212, Florida Statutes. Thus, both the State and the City of Tampa are being deprived of substantial tax and revenue sharing funds. And, by virtue of the "trust" status, the land has not been placed on the ad valorem tax roll.

After various extensions of time to answer the pleading, a stay pending

settlement negotiations and an intervention by the Seminole Tribe, the Department and the Secretary on March 23, 1983, filed their Motion to Dismiss arguing that Petitioners lacked standing to maintain this suit, and that the United States was the real party in interest and thus the suit was barred by the doctrine of sovereign immunity. After the Department's motion was filed, but before it was ruled upon, Petitioners filed a Motion to Amend the Complaint accompanied by the proposed amended complaint. The proposed amended complaint added an allegation that the Hillsborough property had not been included among the taxable properties on the 1982 Hillsborough County tax roll and was listed as exempt for the 1983 tax year. Petitioners' motion to amend the

complaint was not ruled upon.

The Department's Motion to Dismiss was granted with prejudice on March 14, 1984, and an appeal was taken to the Eleventh Circuit Court of Appeals.

The Notice of Appeal to the Eleventh Circuit Court was filed on April 12, 1984, and the Petitioners' brief was mailed June 8, 1984. The Department's brief was filed before July 30, 1984, while the Seminole Tribe's brief was received on August 13, 1984. After granting a continuance motion on behalf of the Seminole Tribe, the Eleventh Circuit Court heard the oral arguments in January 1985. The Court affirmed the Middle District Court of Florida on the basis of the U.S.'s sovereign immunity, but did not decide the standing question. This decision was reached August 16,

1985, giving rise to this certiorari petition.

The determination of whether or not title to the property is vested in the United States goes to the heart of the dispute between the parties. The District Court and the Eleventh Circuit erred in basing the dismissal on facial title without examining the circumstances by which title was taken.

Two main reasons support Petitioners position. The United States is not a real party in interest in this case, and the Secretary of the Department of Interior exceeded his authority by waiving, without lawful authority, certain Department rules which afford adequate protection to the States when the state sovereignty is adversely affected or diminished by the trust acquisition.

ARGUMENT I

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN DECIDING IT LACKED JURISDICTION OVER A CASE WITHOUT REVIEWING THE MERITS, IN CONFLICT WITH LAND V. DOLLAR, 330 U.S. 731 (1947), AND EATON V. DORCHESTER DEVELOPMENT, INC., 692 F.2d 727 (11th Cir. (1982).

In Land v. Dollar, 330 U.S. 731 (1947), ownership of stock certificates was at issue between the stockholders of Dollar Steamship Line, Inc., Ltd. and the United States Maritime Commission. The District Court on its own motion dismissed with prejudice the complaint of the stockholders holding that the suit was in actuality one against the United States. The Court of Appeals reversed and this Court granted certiorari, characterizing the Dollar case as one where the question of jurisdiction was

dependent on a decision on the merits. Id. at 735.

> ...[I]f the allegations of the petition are true, shares of stock never were property of the United States.... If ownership of the shares was in the United States, suit to recover them would of course be a suit against the United States....
>
> ...We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits.

Id. at 738-39.

The merits of Petitioners' case would show the incomplete basis which the Department of Interior was given surrounding the "in trust" property acquisition. The Florida Congressional delegation was asked to support the "in trust" property acquisition for a cultural museum and burial ground for the remains and artifacts discovered in the

downtown Tampa area. However, no information was given to the executive branch of the State government concerning this "in trust" property status. (Appendix 1b-12b).

Land v. Dollar, supra, has been cited recently by the Eleventh Circuit with approval in the case of Eaton, supra. The complaint there based jurisdiction on the Interstate Land Sales Full Disclosure Act which excluded from its coverage subdivisions containing fewer than one hundred lots. Dorchester Development moved for dismissal on the ground that its subdivision contained less than one hundred units. Plaintiffs responded that Dorchester was not exempt because it was part of a larger subdivision containing more than one hundred units. The District Court

dismissed on the ground that Dorchester contained less than one hundred units and was exempt from the Act and thus the court was divested of subject matter jurisdiction. The Eleventh Circuit held that the District Court's dismissal was premature citing to Dollar among other cases. The Court said:

> Where the jurisdictional issues are intertwined with the substantive merits 'the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other.' (Citations omitted.) (Emphasis added.)

Id. at 733.

Similar to the Eaton case, the issue of whether or not the District Court has jurisdiction depends on the merits of this Petitioners' argument that title in the United States is void. If title is void and hence never vested in the United

States, then the courts have subject matter jurisdiction. Where the jurisdictional issue of whether or not title is in the United States such that sovereign immunity is implicated is intertwined with the substantive merits of whether or not the Secretary's act of taking title in the name of the United States was lawful, the jurisdictional issues should be referred to the merits for it is impossible to decide one without the other. Under the rule of Eaton the District Court's dismissal with prejudice is premature in this action.

In United States v. Lee, 106 U.S. 196 (1882), the estate of Robert E. Lee was acquired by the United States for non-payment of taxes. The taxes in fact had been tendered. An ejectment action was brought against the governmental

custodians of the estate. The trial court found that the tax sale by which the United States had taken title was invalid and that title to the property was in the Plaintiffs. The Supreme Court upheld the trial court and held that a suit against the governmental custodians under these circumstances was not a suit against the sovereign.

Likewise, the United States has acquired the Hillsborough property in trust status by the Secretary's acceptance of the property in an invalid manner. Petitioners alleged that the grant of such status was unlawful, just as the tax sale in Lee was unlawful. The acquisition being invalid, title never vested in the sovereign and the suit is not a suit against the sovereign.

The rule postulated by Lee has since

been limited to require that the allegations show affirmatively any relevant legal limitations on an agency's or official's actions in taking title in the sovereign's name and an assertion that the limitations were exceeded. Larson, supra, and Malone v. Bowdoin, et al, 369 U.S. 588 (1962). As required by Larson, Petitioners here have alleged that 25 C.F.R. Section 1.2 (1960) and 25 C.F.R. Section 151 (4-1-85), formerly known as 25 C.F.R. Section 120a, circumscribe the Secretary's discretion in granting trust status and that those restraints were exceeded by the Secretary when he, without lawful authority, waived his own rules and took title in trust to this property in the name of the sovereign.

Because the allegations in the

Petitioners' complaint comport with the requirements for jurisdiction postulated by Lee as limited by Larson and Malone, the courts have jurisdiction to hear Petitioners' prayer. Any other position would defeat the parameters this Court has set.

ARGUMENT II

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN DECIDING THAT SOVEREIGN IMMUNITY DID NOT ALLOW THE PETITIONERS THE OPPORTUNITY FOR JUDICIAL REVIEW WHEN AN OFFICER EXCEEDED HIS AUTHORITY IN CONFLICT WITH FLORIDA DEPARTMENT OF STATE V. TREASURE SALVORS, INC., 458 U.S. 670 (1982).

In applying the sovereign immunity analysis to Eleventh Amendment claims, this Court in Florida Department of State v. Treasure Salvors, Inc., 458

U.S. 670 (1982), said:

> ...The 'settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf.' ... The Court refused to accept the proposition that the 'doors of the courts of justice are ... closed against one legally entitled to possession, by the mere assertion of the defendants that they are entitled to possession for the State.'

Id. at 686-687, quoting from Tindal v. Wesley, 167 U.S. 204 (1897), which in turn relied on Lee (citations omitted).

This Court in Treasure Salvors concluded:

> These cases make clear that the Eleventh Amendment does not bar

> an action against a State official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional.

Treasure Salvors, Inc., 458 U.S. at 689.

By reversing the analogy and applying this Eleventh Amendment analysis to the issue of sovereign immunity, the sovereign's immunity does not bar an action against a federal official that is based on a theory that the officer acted beyond the scope of his authority. Petitioners alleged that the Secretary and the Department acted beyond the scope of the parameters they set for themselves in 25 C.F.R. Section 1.2 (1960) and 25 C.F.R. Section 151 (4-1-85), formerly known as 25 C.F.R. Section 120a, when they accepted the Hillsborough property

into trust status. Thus, this action is not barred by the immunity of the United States.

It must be noted, the State of Florida does not (and has not) claim(ed) that it is entitled to possession of the land held in trust. Florida's claim is the more superior claim that the State of Florida is the sovereign over this land.

The Secretary is empowered by the Indian Reorganization Act, 25 U.S.C. Sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, 479 (1934), to take land in trust for the Tribe. That power, however, is controlled by the Secretary's own regulations and the complaint properly alleges that in this case those regulations were not followed. Hence, the Secretary's act here was outside the

scope of his authority and was void. The sovereign's immunity is not implicated.

The Secretary has circumscribed his exercise of discretion by the implementation of rules. Section 701(a)(2) of the Administrative Procedure Act, at 5 U.S.C. Section 701(a)(2) (1966), precludes judicial review of agency action committed to agency discretion by law. The Indian Reorganization Act at 25 U.S.C. Section 465 (1934), authorizes the Secretary in his discretion to acquire land in trust for the Tribe. The combined effect of these two sections would appear to prohibit judicial review. The inquiry however does not end here. In the Department's rules, the Secretary reserved discretion only:

To waive or make exceptions to

> his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interests of the Indians.

25 C.F.R. Section 1.2 (1971). (emphasis added.)

The Secretary cited as authority for waiver under this provision of the Code the Indian Religious Freedom Act, 42 U.S.C. 1996, (1978). There is no language in this law which authorizes waiver of the regulations for acquiring land in trust for the Indians. Nor was the acquired Hillsborough property in the acquisition process ever asserted to be sacred to the Indian religion or necessary for their worship or the performance of any sacred rite.

In the case of Local 2855, AFGE

(AFL-CIO) v. United States, 602 F.2d 574 (3rd Cir. 1979), the Court said:

> Determination that a matter is unreviewable because it is committed to agency discretion does not, however, "slam(s) the door to the courthouse air tight." Even when a court ascertains that a matter has been committed to agency discretion by law, it may entertain charges that the agency's decision ... violates a constitutional, statutory or regulatory command.

Id. at 580 (emphasis supplied.) In Service v. Dulles, 354 U.S. 363 (1957), the challenged act of the Secretary of State was by statute purely discretionary. Nevertheless, this Court held that the act was illegal if it violated the Secretary's regulations. In Vitarelli v. Seaton, 359 U.S. 535 (1959), the Secretary of Interior's action was purely discretionary under statute. By relying on regulations (which but for the

Secretary's citation of them would also have been inapplicable) the Secretary obligated himself to comport with those regulations and his failure to do so rendered his actions void.

The force and effect to be accorded administrative regulations differs depending on whether the regulation is considered merely an internal housekeeping arrangement or whether it bears on individual rights. Brookhaven Housing Coalition v. Kunzig, 341 F.Supp, 1026 (E.D.N.Y. 1972). The regulations surrounding the acquisition of property in trust for Indians are not merely internal housekeeping arrangements, however, and the rule that regulations must be observed even where they impose greater restrictions than the organic act has been applied in situations analogous

to that here at issue. In the case of Brookhaven Housing Coalition, supra, failure of the General Services Administration to abide by its rule requiring consultation with other agencies on community impact before selecting an office building site rendered the selection void. And, in National Association of Greeting Card Publishers v. United States Postal Service, 569 F.2d 570, 601 at n.138 (D.C. Cir. 1976), vacated on other grounds, 434 U.S. 884 (1977), a case involving a challenge to proposed rate increases, the Court required observance of rules having substantial public impact, even where those rules imposed restrictions greater than the restrictions imposed by the Act. In McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955), the Court held that the

Secretary of Interior was bound by his rules with respect to the award of mineral leases. There, those rules had been violated and the award was found to be void. (emphasis added). In Sheridon-Wyoming Coal Co. v. Krug, 172 F.2d 282 (D.C. Cir. 1949), reversed on other grounds, 338 U.S. 621 (1950), the Court found that the Secretary of Interior had followed his regulations for the award of mineral leases and that his action in that case was valid.

In a case remarkably similar to this case, Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), appeal after remand, 521 F.2d 941 (D.C. Cir. 1975), the Court reversed the District Court's dismissal for lack of jurisdiction. That case was a declaratory judgment action seeking a

declaration of invalidity of FAA action in letting a contract to an unresponsive bidder in violation of FAA rules. The Circuit Court held that sovereign immunity and agency discretion were not bars to the maintenance of the action. Likewise, this case is a declaratory judgment action seeking a declaration of invalidity of the Secretary of Interior's action in taking property into trust status in violation of the Secretary's rules. Likewise, sovereign immunity and agency discretion do not bar the maintenance of this suit.

> In general, even where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations.

Garcia v. Neagle, 660 F.2d 983 (4th Cir.

1981) cert. den. 454 U.S. 1153 (1980). See also Ness Investment Corp. v. Department of Agriculture, 512 F.2d 706 (9th Cir. 1975). (emphasis added.)

Violation of an administrative regulation even by the promulgating agency is a violation of the Act pursuant to which the regulation was adopted. Westmoreland v. Laird, 364 F.Supp. 948 (E.D.N.C. 1973), affirmed 485 F.2d 1237 (4th Cir. 1973). The acquisition of land in trust status has great public impact by virtue of restricted revenues, by virtue of restricted State sovereignty, and by virtue of the inability of tax collection and supervisory agencies to fulfill their obligations to the public.

The Secretary gratuitously circumscribed his discretion reserving it only for instances where waiver of his

rules is authorized by law. The law cited by him as authority for waiving his requirements contains no authority for waiver of the regulations. The Secretary is held to observance of his regulations and the courts are empowered to review his acts to determine whether or not the Secretary has exceeded the strictures placed on him by those regulations.

The exercise of its sovereignty by the State of Florida over the Hillsborough property was ousted when the Secretary accepted the Hillsborough property into trust status after unlawfully waiving his own rules. The State of Florida will be detrimentally affected by its inability to collect state taxes from the revenue generated by the establishments created on this "in trust" property. Such interference with

a State's ability to discharge duties and responsibilities has been recognized as the injury in fact necessary to meet the first prong of the Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150 (1970), standing requirement. See Coleman v. Miller, 307 U.S. 433 (1939) (State legislator standing); United States ex rel. Chapman v. Federal Power Commission, 345 U.S. 153 (1953) (Standing of Secretary of Interior to challenge FPC order); Interstate Commerce Commission v. Oregon-Washington Railroad and Navigation Co., 288 U.S. 14 (1933) (State agency standing to challenge ICC order). The second prong of the standing requirement was met when the Petitioners' pleadings showed their interests asserted were within the zone of interests regulated by the Indian

Reorganization Act.

In City of Sault Ste. Marie, Michigan v. Andrus, 458 F.Supp. 465, 468 (D.C. Cir. 1978), the city claimed injury to its revenue and sovereignty by allegedly improper acquisition by Interior of land in trust for the Sault Ste. Marie Tribe of Chippewa Indians. The Dictrict Court held that the city had standing. See also City of Tacoma v. Andrus, 457 F.Supp. 342 (D.C. Cir. 1978), (city alleging injury to tax and police power by Interior's trust acquisition for the Puyallup Tribe had standing.)

The State of Florida has alleged interference with its taxing and enforcement powers over the Hillsborough property and thus has shown the injury in fact necessary to sustain the action.

The action of the Secretary in

accepting the Hillsborough property into trust status divested the State of Florida of its sovereign power over such tract. Where the Secretary in so acquiring land acts outside the parameters set for determining trust status as alleged, the State's divestiture is unlawful and creates an injury in fact conferring standing on the State.

The Secretary's discretion under 25 U.S.C. Section 465 (1934), to accept land into trust status does not permit him to ignore the impact of his decision on state jurisdiction. This is the Secretary's own view:

> In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:
>
> * * *

> (e) ...The impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise;....

25 C.F.R. Section 151.10 (4-1-85), formerly 25 C.F.R. Section 120a.10.

In Watt v. Energy Action Educational Foundation, 454 U.S. 151 (1981), the State of California, among others, sued the United States and the Secretaries of the Department of Interior and the Department of Energy alleging abuse of discretion as to use of particular bidding systems for the award of oil and gas leases off the coast of California. In response to a standing challenge, this Court found that because a share of the revenues from the leases went to the State of California, California had a

direct financial stake in the actions of the Secretary. California had alleged that the Secretary's actions impaired its share of revenues and the Court held that by so alleging California had asserted the "distinct and palpable injury" required for standing. Id. at 212, citing Warth v. Seldin, 422 U.S. 490 (1975).

As in Watt, the Secretary's failure to follow his own rules and regulations is depriving the State of Florida of revenue to which it is entitled. Florida has been adversely affected by this unlawful action and is being denied the opportunity for review of this injustice.

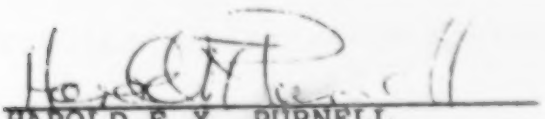
This is a question of vital concern to all the States. The Secretary of the Interior now can establish pockets of

sovereign areas within a State, without that State's ability to review such potentially detrimental action.

The Hillsborough "in trust" property is not adjacent to any reservation lands, in fact, it is far removed from the Okeechobee area. The property is being used for economic purposes which are substantially affecting the State's source of revenue. Without the benefit of review, the Secretary may place pockets of sovereign areas throughout the State to the detriment of the State as a whole.

Therefore, for the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



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November 13, 1985.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: PETER C. MONSON, ESQUIRE, Land and Natural Resources Division, Washington, D.C. 20530; EDWARD SCHWAKER, ESQUIRE, Department of Justice, Land and Natural Resources Division, Washington, D.C. 20530; CHARLES ROSS, ESQUIRE, P. O. Box 3542, St. Petersburg, Florida 33731; JACK M. SKELDING, JR., ESQUIRE, P. O. Box 669, Tallahassee, Florida 32302; JOSEPH G. SPICOLA, JR., ESQUIRE, City Attorney, City Hall, 305 Jackson Street, Tampa, Florida 33602; ROBERT W. MERKLE, ESQUIRE, United States Attorney, 500 Zack Street, Tampa, Florida 33602; WILLIAM H. COLDIRON, SOLICITOR, Department of Interior, Washington, D.C. 20240; MARTIN W. MATZEN, ESQUIRE and WENDY B. JACOBS, ESQUIRE, Department of Justice, Washington, D.C. 20530; and F. HENRY HABITCHT II, ESQUIRE, Assistant Attorney General, The Justice Building, Washington, D.C. 20530, this 13th day of November, 1985.

HAROLD F.X. PURNELL
General Counsel
Department of Business Regulation

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STATE OF FLORIDA and CITY OF TAMPA, FLORIDA Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, and JAMES WATT, Secretary of the Interior, Defendants, and SEMINOLE TRIBE OF FLORIDA, Defendants-Intervenor.	CASE NO. 82-82 Civ-T-K ORDER

This matter is before the Court on the United States' Motion to Dismiss. Having reviewed the motion and supporting memoranda of the United States Department of the Interior, et al. as well as the

memoranda filed by the plaintiff State of Florida, the memoranda filed by defendant-intervenor Seminole Tribe, and being otherwise duly advised in the premises, the Court finds (1) that plaintiffs lack standing to bring this action and (2) that this Court lacks jurisdiction to entertain this action because the sovereign immunity of the United States with respect to the subject matter of the suit has not been waived. Accordingly, it is hereby,

ORDERED AND ADJUDGED that this action is DISMISSED WITH PREJUDICE, each party to bear his or her own costs. The clerk is hereby ordered to enter judgment accordingly.

Done and Ordered in chambers at Tampa, Hillsborough County, Florida, this 14th day of March, 1984.

/s/
ELIZABETH A. KOVACHEVICH
United States District Judge

Prepared by:

/s/
PETER C. MONSON
Attorney, Department of Justice
Land and Natural Resources Division
Washington, D.C. 20530
(202) 724-7430

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3246

D.C. Docket No. 82-00082

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, STATE OF FLORIDA, DEPARTMENT OF REVENUE, STATE OF FLORIDA, and THE CITY OF TAMPA, FLORIDA,

Plaintiffs-Appellants,

versus

UNITED STATES DEPARTMENT OF THE INTERIOR and DONALD P. HODEL, SECRETARY OF THE INTERIOR,

Defendants-Appellees,

SEMINOLE TRIBE OF FLORIDA,

Defendants-Intervenor-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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Before KRAVTICH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United Stats District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees and defendant-intervenor-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 16, 1985
For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: SEP 9 1985

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, State of Florida, Department of Revenue, State of Florida; and the City of Tampa, Florida, Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF the INTERIOR and Donald P. Hodel, Secretary of the Interior, Defendants-Appellees,

Seminole Tribe of Florida, Defendant-Intervenor-Appellee.

No. 84-3246.

United States Court of Appeals, Eleventh Circuit.

Aug. 16, 1985.

Various state agencies and city filed action challenging decision of Secretary of the Interior to acquire a tract of land in trust for the benefit of the Seminole Indian Tribe of Florida. The United States District Court for the Middle District of Florida, Elizabeth A. Kovachevich, J., dismissed the complaint on the basis of sovereign immunity and standing, and state agencies and city appealed. The Court of Appeals, Kravitch, Circuit Judge, held that decision by Secretary to acquire the land was unreviewable as within the Secretary's discretion, where Secretary had congressional authority to acquire the land, and Tribe had interest in land before United States acquired title.

Affirmed.

1. United States ⇐125(1)

United States' sovereign immunity operates as a complete bar to lawsuits, even those filed by the states.

2. United States ⇐125(24)

As a threshold manner in any case in which United States' sovereign immunity is invoked, Court of Appeals must first determine whether suit is one against the United States as sovereign.

3. United States ⇐125(24)

Designation of a federal government agency or officer as party defendant does not avoid problem of United States' sovereign immunity; rather, Court of Appeals must examine issues presented and effect of judgment sought.

4. United States ⇐125(24)

If relief sought requires payment of monies from Federal Treasury, interferes with public administration, or compels or restrains the federal government, action is deemed to be one against the United States as sovereign.

5. United States ⇐125(24)

Only where official's conduct cannot be attributed to sovereign because official had no power to do the challenged acts can it properly be said that the action is not one against United States as sovereign.

6. Indians ⇐10

Secretary of the Interior did not exceed his authority in taking land in trust for benefit of Seminole Indian Tribe of Florida, where Secretary had congressional authorization for the acquisition of land and Tribe had interest in the land before the United States acquired title. Indian Reorganization Act, § 5, 25 U.S.C.A. § 46

Synopsis, Syllabi and Key Number Classification
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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

7. Indians ⇐10

Factors set forth in regulation for Secretary of the Interior to consider in evaluating requests for acquisition of land in trust status are not limits on Secretary's authority to acquire land for benefit of Indians; instead, they are factors to be considered in exercising discretion and, as such, do not constrain Secretary's authority to acquire land in trust for Indians.

8. United States ⇐125(6)

Waivers of sovereign immunity are to be strictly construed.

9. United States ⇐125(22)

No action may be brought to quiet title to lands that the United States holds in trust for an Indian tribe. 28 U.S.C.A. § 2409a.

10. Indians ⇐27(1)

Court of Appeals is loathe to allow suits seeking to determine whether United States has terminated its trust relationship over Indian lands, without some indication of congressional approval.

11. Indians ⇐27(1)
United States ⇐125(32)

Waiver of sovereign immunity by United States in Administrative Procedure Act, 5 U.S.C.A. § 702, did not permit state and city officials to bring action challenging decision of Secretary of the Interior to acquire a tract of land in trust for benefit of Seminole Indian Tribe of Florida; instead, even though action was not one to quiet title but was one to divest United States of its title to land held for benefit of Tribe, action was barred under Quiet Title Act, 28 U.S.C.A. § 2409a, by congressional decision to exempt Indian lands from waiver of sovereign immunity.

12. Indians ⇐10

Congress did not intend to permit third parties to disrupt trust relationship of United States to land held for the Indians. 28 U.S.C.A. § 2409a.

13. Administrative Law and Procedure ⇐701

Exception to judicial review contained in Administrative Procedure Act, 5 U.S.C.A. § 701(a)(2), for action committed to agency discretion by law is a narrow one that must be clearly demonstrated before it can be invoked.

14. Administrative Law and Procedure ⇐701

Extent to which a particular statute confers uninhibited discretion upon an administrator is dependent upon whether statute provides standard against which challenged action can be measured; if there are no judicially manageable standards available for judging how and when agency should exercise its discretion, then it is impossible to determine even whether agency abused its discretion.

15. Indians ⇐32(1)

Through Indian Reorganization Act, § 1 et seq., 25 U.S.C.A. § 461 et seq., Congress sought to foster and encourage self-government among the various Indian tribes.

16. Indians ⇐10

It is of necessity that the Secretary of the Interior have broad discretion when reviewing an application to acquire land for the benefit of an Indian tribe. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

17. Indians ⇐32(9)

As a matter of federal law, state was not prohibited from imposing tax on cigarette sales made to non-Indians, even those sales occurring on land held in trust by the United States. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

18. Indians ⇐10

Factors set forth in regulation for consideration when Secretary is acting on request for acquisition of land in trust status for benefit of Indians are not "law" that a reviewing court can apply.

19. Indians ⇐10

Decision by Secretary of the Interior to acquire tract of land in trust for benefit of Seminole Indian Tribe of Florida was unreviewable as within the Secretary's discretion, where Secretary had congressional authority to acquire the land, and Tribe had interest in land before United States acquired title. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465.

20. Administrative Law and Procedure ⇐754

Even when decision is committed to agency discretion, court may consider allegations that agency failed to follow its own binding regulations.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

This litigation involves the combined efforts of the State of Florida, the Florida Department of Business Regulation, the Florida Department of Revenue, and the City of Tampa (appellants), to challenge the Secretary of the Interior's decision to acquire a tract of land in trust for the benefit of the Seminole Indian Tribe. The court below dismissed their complaint on sovereign immunity and standing grounds. We affirm as to sovereign immunity; accordingly we do not reach the standing question.

I. BACKGROUND

In 1980, the City of Tampa began excavation of land near the former site of Fort Brook, an Army outpost that had been used in the nineteenth century relocation of American Indians living in Florida.[1] During this excavation a construction crew unearthed numerous Indian artifacts and a burial site that included skeletal remains of persons of Indian ancestry. Shortly after this discovery, the City of Tampa agreed to transfer the artifacts and bodies to the Seminole Tribe of Florida, with the understanding that the Seminole Tribe would construct a museum in which the artifacts could be displayed and inter the bodies in the land on which the museum would be built.

The Seminole Tribe purchased an 8.5 acre parcel of land in Hillsborough County, Florida for these purposes, and petitioned the Secretary of the Interior to exercise his authority pursuant to 25 U.S.C.A. § 465 and acquire title to the land in trust for the Indians. Although this statute designates that the decision to acquire land in trust for

1. The facts as stated herein are taken from the allegations of the appellants' complaint.

Indians is one within the Secretary's discretion, the Secretary has promulgated regulations that set forth policies and procedures governing the exercise of this discretion. 25 C.F.R. §§ 151.1-151.13. The Secretary, however, has retained the power to waive these regulations "in all cases where permitted by law and the Secretary finds that such waiver ... is in the best interest of the Indians." 25 C.F.R. § 1.2.

On January 16, 1981, the Department took title to the land in the name of the United States. Mindful of the cultural significance of the land's proposed use, the Secretary decided to waive consideration of the regulations that purport to guide the exercise of his discretion. The Secretary reasoned that this land acquisition was unique, because Congress has directed that preservation of the American Indians' religious and cultural heritage is a national objective. *See* 42 U.S.C.A. § 1996.

Shortly thereafter, the Tribe prepared an interment site for the remains, erected a museum for display of the artifacts, and built a center for exhibiting Indian art and craftware. In addition, the Tribe began operation of a "Smoke Shop" to sell cigarettes, tax free, to the general public. Dismayed by the Tribe's decision to sell cigarettes on this land, appellants commenced this lawsuit against the Department of the Interior and then-Secretary James Watt, alleging that 42 U.S.C.A. § 1996 did not authorize the Secretary to waive consideration of the Department's regulations when acquiring the land in trust. Upon the Seminole Tribe's motion, the district court allowed the Tribe to intervene as a party-defendant. The United States and the Tribe each filed a motion to dismiss, arguing that none of the appellants had standing to maintain this action, and that in any event the suit was prohibited by the United States' sovereign immunity. Appellants sought to amend their complaint, alleging that the Seminole Tribe was also conducting bingo games on the land and refusing to collect the state tax on taxable sales transactions occurring on the land. In addition, appellants contended that the Hillsborough County property tax rolls listed the property as exempt from taxation. Without ruling on the motion to amend, the district court dismissed the complaint with prejudice, holding that the plaintiffs lacked standing and that the court lacked jurisdiction because of sovereign immunity.

II. SOVEREIGN IMMUNITY

A. *Real Party in Interest*

[1-4] The United States' sovereign immunity operates as a complete bar to lawsuits, even those filed by the states. *California v. Arizona*, 440 U.S. 59, 61-62, 99 S.Ct. 919, 921-922, 59 L.Ed.2d 144 (1979); *Minnesota v. United States*, 305 U.S. 382, 387, 59 S.Ct. 292, 294, 83 L.Ed. 235 (1939). As a threshold matter in any case in which sovereign immunity is invoked, we must first determine whether the suit is one against the United States as sovereign. *Panola Land Buyers Association v. Shuman*, 762 F.2d 1550 (11th Cir.1985). Designation of a government agency or officer as party-defendant does not avoid the sovereign immunity problem. *Alabama Rural Fire Insurance Co. v. Naylor*, 530 F.2d 1221, 1225-26 (5th Cir.1976). Rather, we must examine the issues presented and the effect of the judgment sought. If the relief sought requires payment of monies from the Federal Treasury, interferes with public administration, or compels or restrains the government, the action is deemed to be one against the United States

as sovereign. *Stafford v. Briggs*, 444 U.S. 527, 542 n. 10, 100 S.Ct. 774, 784 n. 10, 63 L.Ed.2d 1 (1980); *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963); *Alabama Rural Fire Insurance Co.*, 530 F.2d at 1225 (5th Cir.1976).[2]

Appellants contend that they seek judicial review of agency action, a suit with which the federal courts are quite familiar. Yet, from what we can discern from the sparse record before us, the action specifically challenged, that is, the decision to acquire the land and hold it in trust, was one in which appellants acquiesced when it was made. Only after the Seminole Tribe began selling cigarettes and operating bingo games on the land did appellants register their protest. The relief sought further indicates that the gravamen of appellants' suit is the Seminole Tribe's conduct, not the Secretary's decision to acquire the land. Appellants seek to divest the United States of its title to the land, restoring all parties involved to the status quo ante. With the United States no longer holding title to the land, the state presumably could take steps to end the actions to which it objects. Clearly, this relief would operate against the sovereign. *See Hawaii v. Gordon*, 373 U.S. 57, 83 S.Ct. 1052, 10 L.Ed.2d 191 (1963) (lawsuit seeking to order the United States to convey land to the state of Hawaii); *Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939) (condemnation proceeding against property in which the United States had interest).

[5] Relying on *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882), appellants argue that their lawsuit is not one against the United States as sovereign because their contention is that the Secretary exceeded his authority. We disagree. In *Lee*, the Court reviewed a claim that title to property held by the United States was obtained in an unconstitutional manner. If the claim were true, the Court observed, then the government officials exceeded their lawful power when acquiring the property in question. Such an assertion of governmental authority is not insulated from challenge in the courts, because when government officials exceed their authority their actions are not authorized by the sovereign. In such instances, a lawsuit can be maintained against the officials in their individual capacity, without sovereign immunity barring the way. 106 U.S. at 218–221, 1 S.Ct. at 258–262. Subsequent cases make clear that this exception from immunity applies only where the action is challenged as not one of the sovereign because it is alleged to be either unconstitutional or beyond the government agency's statutory authority. *Dugan v. Rank*, 372 U.S. 609, 621–22, 83 S.Ct. 999, 1006–07, 10 L.Ed.2d 15 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 647, 82 S.Ct. 980, 983, 8 L.Ed.2d 168 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701–02, 69 S.Ct. 1457, 1467–68, 93 L.Ed. 1628 (1949). Only where the official's conduct cannot be attributed to the sovereign because the official had no power to do the challenged acts can it properly be said that the action is not one against the United States as sovereign. *McClellan v. Kimball*, 623 F.2d 83, 85 (9th Cir.1980); *see also Gardner v. Harris*, 391 F.2d 885, 888 (5th Cir.1968) ("Merely because the Superintendent may have been acting wrongfully in interfering with plaintiff's access to the

2. The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

highway, either as a matter of violation of property rights under the deeds or as a tort under principles of general law, does not amount to circumstances fulfilling the exception that the officer must be acting beyond his statutory powers.").

[6] In the present case, there can be no doubt that there was statutory authority for the Secretary's decision to take the land in trust. 25 U.S.C.A. § 465. Appellants do not challenge the constitutionality of the Secretary's acts, nor the constitutionality of the statute pursuant to which he acted. Nor do they suggest that the Secretary had no statutory authority for taking the land. Indeed, appellants fail to specify precisely what statutory limits on the Secretary's authority were exceeded. *See Larson*, 337 U.S. at 690, 69 S.Ct. at 1461; *Alabama Rural Fire Insurance Co.*, 530 F.2d at 1226. Their only complaint is that the Secretary abused his discretion by waiving consideration of the factors delineated in the regulations.

Appellants cite two regulations, 25 C.F.R. § 151.3, and 25 C.F.R. § 151.10, they claim were waived. They fail to demonstrate, or even allege, how 25 C.F.R. § 151.3[3] was "waived" in this instance. In fact, their own allegations belie this contention, as they admit that the Secretary has congressional authorization for the acquisition, and that the Seminole Tribe had an interest in the land before the United States acquired title.

[7] Turning to the factors listed at 25 C.F.R. § 151.10,[4] we do not consider them to be limits on the Secretary's authority to acquire land for the benefit of Indians. They do not purport to state for what Indian Tribe the Secretary may acquire land, or how much land may be acquired, or even

3. The regulation provides in part:

> Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.
>
> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or, (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3.

4. This regulation provides as follows:

> In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:
>
> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
>
> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purposes for which the land will be used;
>
> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

25 C.F.R. § 151.10.

the circumstances under which the Secretary may use this authority. Rather, they are more precisely labeled as factors to be considered in exercising discretion. As such, they do not constrain the Secretary's authority to acquire land in trust for Indians.[5] We conclude therefore that appellants have failed to demonstrate that the Secretary exceeded his authority.

B. *Waiver of Sovereign Immunity*

Given that the United States is the real party in interest in this litigation, appellants must establish that the United States has waived its immunity with respect to this kind of lawsuit. Appellants point to the waiver of immunity contained in the Administrative Procedure Act (APA), 5 U.S.C.A. §§ 551–706. Section 702 waives federal sovereign immunity for suits against federal officers in which the plaintiff seeks non-monetary relief.

[8] The government responds that by waiving sovereign immunity under the APA, Congress did not mean to alter any existing limitations on the availability of specific relief. H.R.Rep. No. 1656, 94th Cong., 2d Sess., 12–13 (1976), *reprinted in* 1976 U.S.Code Cong. & Ad.News, 6121, 6133. Indeed, the statute specifically provides that it is not to be read as "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C.A. § 702. The government argues that the waiver of immunity contained within the Quiet Title Act of 1972 (QTA), 28 U.S.C.A. §§ 2409a, 1346(f), and 1402(d), impliedly forbids the relief sought here. In considering the respective positions, we are guided by the principle that waivers of sovereign immunity are to be strictly construed. *United States v. Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 771, 85 L.Ed. 1058 (1941).

[9] With the enactment of the Quiet Title Act, Congress waived the United States' immunity with respect to certain kinds of lawsuits, allowing the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land.[6] By its terms the QTA excludes trust or restricted Indian lands from the scope of the waiver of immunity. 28 U.S.C.A. § 2409a. The rationale for this

5. Appellants also argue that the land in question is not trust land because the United States wrongfully failed to follow the proper procedures in acquiring the land. They cite no authority for their proposition, and indeed, to the extent that they ask us to assume the very fact about sovereign land they desire to prove, their assertion is contrary to the law of this circuit. *See Simons v. Vinson*, 394 F.2d 732, 736–37 (5th Cir.), *cert. denied*, 393 U.S. 968, 89 S.Ct. 398, 21 L.Ed.2d 379 (1968). As previously stated, appellants have made no showing that the Secretary exceeded his statutory authority, or that the authority is unconstitutional. Hence, we are unpersuaded that title to the land in question is not held by the United States for the benefit of the Seminole tribe.

6. Prior to this 1972 statute, an adverse claimant could sue for money damages in the nature of just compensation under the Tucker Act, 28 U.S.C. § 1491, or seek relief under 28 U.S.C. § 1410, if the United States claimed a mortgage or other lien on the property. Congress' primary objection to waiving immunity in the past was concern over dispossessing the United States of property on which governmental operations were being performed. H.R.Rep. No. 92-1559, 92d Cong., 2d Sess., (1972), *reprinted in* 1972 U.S.Code Cong. & Ad.News 4547, 4554. Congress therefore provided that in suits brought under the QTA, if a final decision is adverse to the United States, the government may nevertheless choose to retain the land by electing to pay just compensation. 28 U.S.C.A. § 2409a(b).

exclusion is explained briefly in the legislative history:

> The Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged the administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

H.R.Rep. No. 1559, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.Code Cong. & Ad.News, 4547, 4556–57. Thus, no action may be brought to quiet title to lands that the United States holds in trust for an Indian tribe. *Carlson v. Tulalip Indian Tribes*, 510 F.2d 1337, 1339 (9th Cir.1975).

In *Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983), the Supreme Court applied the rule of statutory construction that a precisely drawn, detailed statute preempts more general remedies, in holding that the QTA is the exclusive means by which adverse claimants can challenge the United States' title to real property. 103 S.Ct. at 1819. To permit otherwise, the Court reasoned, would allow the QTA's carefully crafted limitations on the availability of relief to be circumvented, thereby rendering the Indian lands exception, among other things, null. 103 S.Ct. at 1818. The Court declined to consider the APA waiver of sovereign immunity as a supplemental remedy to the extent that the QTA would forbid the relief sought, invoking the exception to the APA waiver where another statute forbids the relief sought. 5 U.S.C.A. § 702. 103 S.Ct. at 1819 n. 22.

[10, 11] The government insists that *Block* governs the sovereign immunity question in this case. Appellants quite forcefully contend that this is not a suit to quiet title, because they do not seek to have title to the land quieted in them, nor do they seek recognition of any property interest in the land. Although technically the suit in the instant case is not one to quiet title, we conclude that Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here. By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes. Here, the appellants seek an order divesting the United States of its title to land held for the benefit of an Indian tribe. That appellants do not assert an adverse claim of title to the land, however, does not lessen the interference with the trust relationship a divestiture would cause.[7] Moreover, Congress chose to preclude an adverse claimant from divesting

7. To be sure, the relief sought here would not prohibit the United States from reacquiring the land in question. Whether the United States would do so is not a matter for our speculation. In any event, Congress chose to exempt trust or restricted Indian lands from the limited provisions of the QTA, which affords the government the option of giving up the land to an adverse claimant who successfully disputes the government's interest, or paying just compensation. 28 U.S.C.A. § 2409a(b). We believe this exhibits Congress' aversion to having third parties interfere with the United States trust relationship with Indian lands.

the United States' title to Indian lands held in trust.[8] It would be anomalous to allow others, whose interest might be lesser than that of an adverse claimant, to divest the sovereign of title to Indian trust lands.[9] Hence we conclude that the APA waiver of immunity is inapplicable in this instance.

[12, 13] Our conclusion that Congress did not intend to permit third parties to disrupt the trust relationship of the United States to land held for the Indians is bolstered by considering that the congressional waiver of immunity under the APA does not "[affect] other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C.A. § 702. Thus, agency action is still unreviewable to the extent that it "is committed to agency discretion by law." 5 U.S.C.A. § 701(a)(2). This exception to judicial review is a narrow one that must be clearly demonstrated before it can be invoked. *Greenwood Utilities Commission v. Hodel*, 764 F.2d 1459, 1464 (11th Cir.1985). In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), the Supreme Court announced that judicial review of agency action is forbidden by this provision only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410, 91 S.Ct. at 820 (quoting S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)); *see also Heckler v. Chaney*, — U.S. —, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985).

[14] The extent to which a particular statute confers uninhibited discretion upon an administrator is dependent upon whether a statute provides standards against which the challenged action can be measured. *American Federation of Government Employees v. Brown*, 680 F.2d 722, 726 (11th Cir.1982), *cert. denied*, 459 U.S. 1104, 103 S.Ct. 728, 74 L.Ed.2d 952 (1983). If there are no judicially manageable standards available for judging how and when an agency should exercise its discretion, then it is impossible to determine even whether the agency abused its discretion. *Heckler*, 105 S.Ct. at 1655; *Greenwood Utilities Commission v. Hodel*, at 1464.

[15] The statute pursuant to which the Secretary acted in acquiring the land in trust provides in pertinent part:

8. Numerous cases have been brought to determine whether the United States has terminated its trust relationship over Indian lands. In each instance, the court recognized that the power to terminate the trust relationship belonged to Congress, observing that Congress' intention to do so must be plain and unambiguous to be effective. *See, e.g., DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092, 43 L.Ed.2d 300 (1975); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667–670, 94 S.Ct. 772, 777–779, 39 L.Ed.2d 73 (1974); *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 345–47, 62 S.Ct. 248, 251–52, 86 L.Ed. 260 (1941); *Johnson v. M'Intosh*, 8 Wheat. 543, 586, 5 L.Ed. 681 (1823); *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1296–99 (4th Cir.1983), *adopted after reh'g en banc*, 740 F.2d 305 (4th Cir.1984). Hence, we are loathe to allow suits seeking the relief requested here, without some indication of congressional approval.

9. We recognize that a similar argument was rejected by the court in *City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 471–72 (D.D.C.1978). Several of the claims raised in that case involved allegations that the Secretary acted unconstitutionally or beyond his statutory authority when the United States acquired title to the land. *See City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 160 (D.D.C.1980). To that extent the case is distinguishable, because the Secretary's actions could not be considered to be sovereign acts, thereby precluding the immunity defense.

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to land, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands ... there is authorized to be appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> . . . . .
>
> Title to any lands or rights acquired pursuant to [this section] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired....

25 U.S.C.A. § 465. This statute was enacted as part of the Indian Reorganization Act of 1934, 48 Stat. 984, codified as amended at 25 U.S.C.A. § 461 et seq., the purpose of which was to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973) (quoting H.R.Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). Through this statute, Congress sought to foster and encourage self-government among the various Indian tribes. *Fisher v. District Court of Sixteenth Judicial District of Montana*, 424 U.S. 382, 387, 96 S.Ct. 943, 946, 47 L.Ed.2d 106 (1976). The grant of authority to the Secretary of the Interior to acquire land for the Indians was central to this purpose. Previously, the Federal Government had a policy of allotting plots of land to individual Indians. *See* General Allotment Act of 1887, 24 Stat. 388, codified at, 25 U.S.C.A. § 331 et seq. Having failed to meet the land needs of individual Indians and Indian tribes through this policy, because many of the allotted lands were sold to whites, *see* S.Rep. No. 1080, 73d Cong., 2d Sess., 1-2 (1934), Congress directed that Indian land no longer be allotted, 25 U.S.C.A. § 461, and that alienation of restricted Indian land be prohibited except in certain instances. 25 U.S.C.A. § 464. In addition, Congress extended the existing periods of trust and restrictions on alienation for indefinite periods. 25 U.S.C.A. § 462. To ensure that individual Indians and Indian tribes had land adequate for their self-support, Congress further authorized the acquisition of additional lands for Indians, and provided that land so acquired would be held in trust by the Federal Government. 25 U.S.C.A. § 465.

[16, 17] The statute states that the decision to acquire land is one within the Secretary's discretion. Furthermore, it does not delineate the circumstances under which exercise of this discretion is appropriate, except to prohibit additional acquisitions outside the exterior boundaries of certain reservations. Indeed, the decision to acquire a particular tract of land would involve a myriad of factors, including internal management constraints relating to

budget limits, the particular needs of the numerous individual Indians and Indian tribes, the proposed use of the land, and government resources for overseeing the land. In addition, cooperation of state and local authorities would in many cases be essential. It is of necessity then that the Secretary have broad discretion when reviewing an application for land acquisition.[10]

Appellants contend that law to apply might be found in the regulations set forth at 25 C.F.R. § 151.3, and 25 C.F.R. § 151.10. Appellants fail to demonstrate, or even allege, how 25 C.F.R. § 151.3 provides law to apply in this case. They admit that the Secretary had congressional authority to acquire the land. In addition, they admit that the Tribe had an interest in the land before the United States acquired title. And they do not allege that the Secretary failed to approve the land acquisition.

[18] 25 C.F.R. § 151.10 sets forth factors to be considered when the Secretary is acting on a request for acquisition of land in trust status. We believe that the factors, although they are guides for the exercise of the Secretary's discretion, are not "law" that a reviewing court can apply. The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor. Nor does it mandate that the Secretary not acquire lands located in particular areas, or limit the size of acquisitions. The factors listed in the regulation are not the kind of legal principles courts are familiar with applying to a particular case.

[19] Our characterization of these regulations is supported by the Supreme Court's decision in *Panama Canal Co. v. Grace Line*, 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1958). The petitioner in that case asked the Court to review the amount charged in tolls to ships passing through the Panama Canal. Although the statute prescribing the amount to be charged described in some detail the formula to be applied in fixing the toll, the Court concluded that the decision was one Congress had left to the agency's discretion. 356 U.S. at 317–18, 78 S.Ct. at 757–58. The Court observed that the matter was one "on which experts may disagree" involving "nice issues of judgment and choice ... which require the exercise of informed discretion." 356 U.S. at 317, 78 S.Ct. at 757 (citations omitted); *see also Strickland v. Morton*, 519 F.2d 467 (9th Cir.1975) (Secretary of the Interior's decision that public land was "suitable for disposal" was unre-

10. In their complaint appellants alleged that the land's trust status deprived them of their ability to collect the tax imposed on cigarette sales. The parties quarrel over whether Florida law forbids the taxing of all cigarette sales made by Indians, or just those made on reservation or trust land. Whether and to what extent Florida law prohibits collection of this tax is an issue we need not address. We note only that, as a matter of federal law, Florida is not prohibited from imposing a tax on cigarette sales made to non-Indians, even those occurring on land held in trust by the United States. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151, 155–57, 100 S.Ct. 2069, 2082–83, 65 L.Ed.2d 10 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482–83, 96 S.Ct. 1634, 1645–46, 48 L.Ed.2d 96 (1976); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 317 n. 9 (5th Cir.1981), *cert. denied*, 455 U.S. 1020, 102 S.Ct. 1717, 72 L.Ed.2d 138 (1982). Of course, Hillsborough County is forbidden to tax the land under 25 U.S.C.A. § 465. The county, however, is not a party to this proceeding.

viewable as within the Secretary's discretion despite statute's listing ten "reasons" to guide the decision). Thus, we conclude that in this case the Secretary's decision to acquire the land is unreviewable as within his discretion.

III.

[20] Because this lawsuit is barred by the United States' sovereign immunity, we need not address the standing question. *Block v. Community Nutrition Institute*, — U.S. —, 104 S.Ct. 2450, 2458 n. 4, 81 L.Ed.2d 270 (1984). The decision of the court below is AFFIRMED.[11]

11. Even when a decision is committed to agency discretion, a court may consider allegations that an agency failed to follow its own binding regulations. *See Local 2855, AFGE (AFL–CIO) v. United States*, 602 F.2d 574, 580 (3d Cir.1979). As we stated previously, however, the Secretary did not violate any provision of 25 C.F.R. § 151.3. With respect to 25 C.F.R. § 151.10, given the discretionary balancing to be performed by the Secretary, appellants' real allegation is that the Secretary failed to give what they might consider to be the appropriate weight to particular factors. That, however, would not be grounds for overturning the decision. *See Strickland v. Morton*, 519 F.2d 467, 471 (9th Cir.1975).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B

UNITED STATES SENATE

WASHINGTON, D.C. 20510

November 3, 1980

Hon. Cecil D. Andrus
Secretary of the Interior
Interior Building
Washington, D.C. 20240

Dear Mr. Secretary:

We are writing to urge your speedy acceptance of title for lands in Tampa and Tallahassee, Florida in the name of the United States in trust for the Seminole Tribe of Florida as authorized by Section 5 of the Act of June 18, 1934, 48 Stat. 984.

The tribe has purchased land in Tallahassee, the State Capitol of

Florida, for residence when members of the tribe are on official business. This will save money over a period of years and we feel acquisition of the space is a prudent decision by the tribe.

The City of Tampa discovered a Seminole burial ground while excavating land to expand city facilities. Under federal law, the tribe could suspend further excavation and construction on the site, however the tribe and the city have reached an alternative agreement.

The artifacts will be removed to another location in Tampa, and preserved there. The city has given this second site to the Seminoles, in return for the tribe's decision to allow the city to continue excavation and construction on

the original site after removal of the artifacts.

This kind of good faith effort to preserve the tribe's history and meet the City of Tampa's undeniable need for growth is rare indeed, and we see no reason to delay designation of trust status. We thank you for your speedy consideration of the tribe's requests.

Sincerely,

/s/ Lawton Chiles

/s/ Richard (Dick) Stone

Enclosures

Congress of the United States

House of Representatives

Washington, D.C. 20515

December 22, 1980

Stephen Hennington Whilden, Esq.
Counsel
Seminole Tribe of Florida
6073 Stirling Road
Hollywood, Florida 33024

Dear Mr. Whilden:

Thank you for your telegram of December 16th. Jan Stoorza had also advised me of your telephone conversation with her. I am sorry to learn that you feel my letter to the Secretary of the Interior in support of your request to have the Tribe's land acquisition in Hillsborough County taken in trust for the Tribe has caused additional problems. It is my understanding that the Department will consider a new acquisition request which

is in compliance with their recently-published regulations, as requested in their letter of November 25th to Chairman Billie, and I'm sure that if the Tribe wants to enlarge on plans for "economic development" in that material it will receive every consideration.

My letter to the Secretary stated my position. I was pleased to express my support for the planned museum and cemetery. Blanket support for "economic development" would put me in a very awkward position. As you know, matters of land use planning, zoning, etc. are entirely under local jurisdiction, and I have always taken the position that I do not become involved in such matters where I have no jurisdiction.

Sincerely,

/s/

Sam M. Gibbons

United States Congressman

SMG:s

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Dear Chairman Billie:

I have prepared this letter and requested that the Area Director of the Eastern Area Office personally deliver it to you on my behalf. Representatives of the State of Florida have met with officials of this Department and called to our attention a situation that could have adverse impacts not only on the Seminole

Tribe but could generate repercussions that would impact the interests of other tribes as well. I am referring to the opening of a smokeshop on land near the City of Tampa that the Department accepted in trust status on January 16 of this year.

The acquisition of trust lands pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, has been and continues to be an extremely heated political issue. Because of challenges to the Secretary's authority to accept lands in trust for tribes, and being aware that Congress could easily terminate such authority, the Department spent almost two years drafting, holding hearings and getting final approval of land acquisition regulations. These

regulations became final on October 20, 1980.

When the tribe initially approached the Department with its request that land in Tallahassee and Tampa be accepted in trust, the tribe was advised that the Tallahassee parcel would not be considered for trust acquisition but that we would consider the Tampa site for acceptance if the tribe could demonstrate that the acquisition was necessary to safeguard cultural sites in the Tampa area. Based on endorsements from Senators Chiles and Stone and Representatives Gibbons and Fuqua supporting the acquisition for purposes of preserving artifacts and the possible construction of a museum, and based on representations from the tribe that it

intended to be a good neighbor to the City of Tampa, use the land primarily for reinterring remains, the construction of a museum and related activities, and the construction of housing for tribal employees, the Department reconsidered the tribe's request for trust acquisition.

In reliance upon the support of the Florida congressional delegation, (which, it must be reemphasized, was limited to use of the land as a burial site and museum) the City of Tampa's support, and the tribe's representations, the Department took, on the tribe's behalf, an extraordinary action and waived the provisions of our land acquisition regulations, 25 CFR 120a. When the entire scenario surrounding this

acquisition is reviewd, it appears that the tribe failed, if not by design, at least by omission, to reveal its true intentions for the use of this property. The Department's communications with members of Congress and local state officials and its decision to accept the land in trust were predicated on the unique cultural aspects of the Tampa archaeological finds and not as a haven for the tribe to conduct smokeshop operations (or bingo) on a tract of trust land far removed from the tribe's existing reservation.

Because of the furor the tribe's activities on this land has caused and because it could have adverse impacts on the Department's ability to acquire trust lands for other tribes, I feel compelled

to advise you of the possible ramifications of the tribe's actions. First, Congress could curtail or eliminate the Secretary's broad authority to acquire additional trust lands. It could also either remove the Tampa parcel from trust status or set limits for its use. In addition, it is our understanding that the tribe's ability to sell untaxed cigarettes is based on a state law. The next session of the State Legislature begins in January and there is little doubt that the cigarette tax issue will be discussed. The tribe should carefully assess its position, in light of the Supreme Court's recent decision in Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980), if the state law is repealed or modified and with the understanding that although the

Tampa parcel is in trust it is not part of the Seminole Reservation.

In short, I request that the tribe carefully consider the possible impacts of its actions in Tampa, not only for adverse effects on the Seminole Tribe but for possible effects on other tribes who are seeking additional trust lands; and I request that the tribe bring its activities in Tampa in line with the original purpose for which the land was accepted in trust.

Sincerely,

/s/ Roy H. Sampsel

Deputy Assistant Secretary -
Indian Affairs

APPENDIX C

UNITED STATES DISTRICT COURT
OF FLORIDA, MIDDLE DISTRICT

STATE OF FLORIDA: DEPARTMENT OF BUSINESS REGULATION, STATE OF FLORIDA; DEPARTMENT OF REVENUE, STATE OF FLORIDA; and the CIT OF TAMPA, FLORIDA,	:	
Plaintiffs,	:	82-82 Civ-T-H
v.	:	S.P.
UNITED STATES DEPARTMENT OF THE INTERIOR, and JAMES WATT as Secretary of the Interior,	:	
Defendants.	:	

COMPLAINT

The State of Florida; the Department of Business Regulation, State of Florida; the Department of Revenue, State of Florida; and the City of Tampa, Florida sue the United States Department of the Interior and James Watt, successor to Cecil Andrus, as Secretary of the

Interior, for declaratory and injunctive relief and would state:

Jurisdiction

1. Jurisdiction of this Court is invoked pursuant to the authority of 28 U.S.C. 1331, 1361 and 5 U.S.C. 702.

2. This is an action founded on 25 U.S.C. 465 and 42 U.S.C. 1996 and 25 CFR 120a challenging the legal authority of the Secretary of the Interior and/or the Department of Interior's action in taking title in trust for the Seminole Indians of Florida of certain land in Hillsborough County, Florida, more particularly described in Exhibit A.

Parties

3. The State of Florida is a

sovereign entity exercising those powers not reserved to the Federal Government under the United States Constitution, over the lands defined in Art. II, Section 1 of the Florida Constitution, including on and before January 16, 1981 those lands described in Exhibit A.

4. The Department of Business Regulation, State of Florida, is a part of the executive branch of government of the State of Florida, created by Florida Statute 20.16 and exercising those powers enumerated in Chapter 210, Florida Statutes relative to the collection of cigarette taxes and the enforcement of cigarette tax laws within the State of Florida.

5. The Department of Revenue, State of Florida, is a part of the executive branch of government of the State of

Florida created by Florida Statute 20.21 and exercising those powers enumerated in Chapter 212, Florida Statutes, relative to the collection of sales taxes and the enforcement of sales tax laws within the State of Florida and exercising those powers enumerated in Chapter 194-197, Florida Statutes concerning supervision of ad valorem tax laws within the State of Florida.

6. The City of Tampa is a duly created municipality within the State of Florida, County of Hillsborough, exercising all powers authorized by law. The City of Tampa is entitled to receive funds from the Municipal Financial Assistance Trust Fund created and funded pursuant to Florida Statutes 210.20(2)(a) from cigarette tax revenues and the Revenue Sharing Trust Fund for

Municipalities created by Florida Statutes 218.215(2) and funded in part from cigarette tax revenues.

7. The Department of Interior is a part of the executive branch of the government of the United States exercising those powers and duties provided by law. The Department is headed by the Secretary of the Interior who is authorized by law, 25 U.S.C. 465, to take title to property in trust for Indian tribes pursuant to the provisions of 25 CFR 120a entitled "Land Acquisitions."

Facts

8. On or about January 16, 1981, immediately prior to the end of the Carter administration, then Secretary

of Interior Cecil Andrus accepted in trust for the Seminole Indians, title to a parcel of land located at I-4 and Orient Road in Hillsborough County, Florida. The land was officially accepted in trust pursuant to Memorandum dated January 16, 1981 from the Assistant Secretary - Indian Affairs. A copy of said Memorandum is attached hereto and incorporated herein as Exhibit A. Acceptance of land in trust for Indians by the Secretary of the Interior exempts said land from state and local ad valorem taxation, 25 U.S.C. 465, and state and local zoning and land use regulation, 25 CFR 1.4.

9. In accepting title to the land in Hillsborough County in trust for the Seminole Indians, the Secretary of the Interior and/or the Department of

Interior waived compliance with 25 CFR 120a, the Department of Interior rules governing land acquisitions for Indians, based on 25 CFR 1.2 and 42 U.S.C. 1996, the American Indian Religious Freedoms Act. 25 CFR 1.2 provides that the Secretary of the Interior may waive compliance with any rule in 25 CFR where authorized by law. The Secretary of the Interior relied upon the authority of 42 U.S.C. 1996 in waiving compliance with 25 CFR 120a.

10. The aforementioned property came to be acquired in trust when, in 1980, the City of Tampa was excavating certain property (other than described in Exhibit A) relative to the construction of a municipal parking garage. The site of the municipal parking garage was at or near the former location of Ft. Brooke,

an Army outpost which in the 1800's was involved in the relocation of Indians in Florida to areas in the Western part of the United States. In the course of the excavation, a burial site was found containing the skeletal remains of some 129 persons. Archaeological review indicated that some of the remains found belonged to persons of Indian ancestry. Additionally, Indian artifacts were also found at the excavation site. It was agreed between City of Tampa officials and the Seminole Indians that both the Indian skeletal remains and the Indian artifacts would be turned over to the Seminoles who, in turn, would acquire a piece of property for use as an interment site and cultural museum displaying the Indian artifacts.

11. The Seminole Indians acquired

a site of land at I-4 and Orient Road in Hillsborough County, more particularly described in Exhibit A. The said land has never been asserted to be sacred to Indian religion or necessary for worship or the performance of any sacred rites. The Seminole Indians, after acquiring title to such property, petitioned the Secretary of Interior and/or the Department of the Interior to accept such land in trust for the Seminoles, pursuant to 25 U.S.C. 465. In seeking to have the Hillsborough County property taken in trust by the Secretary of the Interior and/or the Department of the Interior, the Seminole Indians represented that the use of the land would be for an interment site for the Indian skeletal remains, a cultural museum for the Indian artifacts found at the aforementioned City of Tampa

excavation site and related activities. See Interior Department letter attached hereto and incorporated herein as Exhibit B.

12. In accepting the property in trust for the Seminole Indians, the Secretary of Interior and the Department of Interior failed to require the Seminole Indians to comply with the provisions of 25 CFR 120a and in particular, 25 CFR 120a.3 and 10. At no time on or prior to January 16, 1981, were any appropriate local, state or federal officials appraised of the intended purpose for which the land would be used by the Seminole Indians and consequently no decision could have been made as to why "in trust" status would be essential for tribal programs.

13. Immediately following the

acquisition of the Hillsborough County property in trust for the Semiole Indians, the Indians commenced utilizing the property for the operation of a "smoke shop," a retail shop selling cigarettes tax free to the non-Indian general public. Such "smoke shop" commenced operation on or about July 14, 1981, prior to the Indians acquiring the Indian skeletal remains and artifacts found at the Ft. Brooke site. The Seminoles at such "smoke shop" are not reporting and/or paying cigarette taxes levied pursuant to Chapter 210, Florida Statutes, nor sales taxes levied pursuant to Chapter 212, Florida Statutes, and thus are depriving the State and the City of Tampa of substantial taxes and revenue sharing funds. Further, Plaintiffs believe that the Seminoles have or will

seek to prevent ad valorem taxes from being levied on said land and property situated thereon.

COUNT I

14. The Plaintiffs reallege the allegations of paragraphs 1-14 of this Complaint.

15. The Secretary of the Interior and/or the Department of the Interior, in accepting the Hillsborough County property in trust status, waived the provisions of 25 CFR 120a on the authority of 42 U.S.C. 1996, the American Indian Religious Freedom Act. Such Act provides:

> On or after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional

> religions of the American Indian, Eskimo, Aleut and native Hawaiians, including but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonial and traditional sites.

16. 25 CFR 1.2 authorizes the Secretary of the Interior to waive the requirements of 25 CFR "where permitted by law." 42 U.S.C. 1996 does not authorize or permit the waiver in the instant matter of 25 CFR 120a. The American Indian Religious Freedom Act implements an express congressional purpose to protect particular lands or sites of religious significance to American Indians, but does not in any manner authorize the acquisition of land in trust for Indians where said land is not alleged to be of any religious significance to the Indians.

17. The Hillsborough County tract of land accepted in trust by the Secretary of the Interior is substantially removed from the site of the Ft. Brooke excavation where the Indian skeletal remains and artifacts were found. The I-4 and Orient Road site in Hillsborough County has no particular religious significance to Seminole Indians and, indeed, was never asserted at any time prior to January 16, 1981, to have such significance.

18. The Secretary of the Interior was required to comply with the provisions of 25 CFR 120a in accepting the Hillsborough County property in trust for the Seminole Indians and waiver of the requirements of 25 CFR 120a by the Secretary of the Interior constituted an abuse of discretion, an act made without

observance of procedure required by law, and an unauthorized and void act by reason of the fact that the American Indian Religious Freedom Act is not and was not such authority in law as would authorize the Secretary of the Interior to waive compliance with 25 CFR pursuant to the authority of 25 CFR 1.2.

19. The Plaintiffs are in doubt as to their rights in this matter and as to the effect of the Secretary of the Interior and/or the Department of Interior's action on the State of Florida, the Department of Business Regulation and the Department of Revenue's taxing power and tax supervisory and enforcement power over said land and transactions occurring on said land; and the City of Tampa is in doubt as to its entitlement from the

aforesaid trust funds relative to transactions occurring on said land. A present justifiable controversy exists between the parties.

WHEREFORE, it is respectfully prayed that this Court enter an order declaring the Secretary of the Interior and/or Department of Interior's acquisition of the Hillsborough County property in trust for the Seminole Indians to be void and of no force and effect for failure to comply with the provisions of 25 CFR 120a and enjoining the Secretary of the Interior from treating said property as being held in trust for the Seminole Indians and declaring said land to revert to its original status as it existed prior to January 16, 1981.

/s/	/s/
HAROLD F.X. PURNELL General Counsel Department of Business Regulation 725 S. Bronough Street Tallahassee, FL 32301 (904) 488-7365 Attorney for Department of Business Regulation and City of Tampa	JOSEPH C. MELLICHAMP Assistant Attorney General The Capitol Tallahassee, Florida 32301 (904) 487-2142 Attorney for State of Florida and Department of Revenue

JOSEPH G. SPICOLA, JR.
City Attorney
City Hall
305 Jackson Street
Tampa, Florida 33602
(813) 223-8162

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 16 1981

Memorandum

To: Commissioner of Indian Affairs

Attn: Area Director, Eastern Area

From: Assistant Secretary - Indian Affairs

Subject: Waiver of 25 CFR § 120a - Trust Acquisition for Seminole Tribe of Florida

I have reviewed the attached file on the request of the Seminole Tribe of Florida for trust acquisition of a tract in Hillsborough County, Florida, and have determined, pursuant to 25 CFR § 1.2, that a waiver of the requirements of 25 CFR § 120a in this case would be in the best interest of the Indians.

This tract will be used to preserve remains of Seminole Indians and artifacts of Seminole culture recently discovered during excavations of a site in Tampa. After discovery, the tribe entered into an agreement with the city in which the tribe agreed to acquire a site for relocation of the remains, to accept the remains on permanent loan from the city, and to do everything within its power to protect and preserve them. The tribe has acquired a site in Hillsborough County, Florida which it will use for this purpose.

The situation presented with this trust acquisition request is an unusual one because of the unique cultural significance of its intended use. Preservation of the tribe's religious

and cultural heritage is a purpose encompassed within the policy which Congress directed the Executive to observe in the American Indian Religious Freedom Act, 92 Stat. 469.

I believe that the unique circumstances bring this acquisition outside the scope of the policy enunciated in the land acquisition regulations at 25 CFR § 120a, in which cultural and religious matters are not specifically addressed, and require that I consider the policy of enunciated in the Religious Freedom Act in addition to factors normally considered when trust acquisitions are made.

Therefore, under authority of 209 DM 8.1 and 25 CFR § 1.2, I hereby waive 25 CFR

§ 120a for purposes of this trust acquisition.

Attachment

/s/

Thomas W. Fredericks

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 16 1981

Acceptance

Pursuant to the authority of Section 5 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. 465, and the authority delegated by 209 DM 8.1, I, Thomas W. Fredericks, Assistant Secretary - Indian Affairs, do hereby accept in the name of the United States, in trust for

the Seminole Tribe of Florida, the following described land located in the County of Hillsborough, State of Florida:

That part of the East 1/2 of the N.E. 1/4 of Section 2, T.29 S., R. 19 E., Hillsborough County, Florida, lying Northerly of State Road No. 400 and East of Orient Road, described as follows:

Commencing at the Southwest corner of the North 967.0 feet of the N.E. 1/4 of the N.E. 1/4 of said Section 2; thence run S-89°-14'-33"-E, along the South Boundary of the North 967.0 feet of said N.E. 1/4 of the N.E. 1/4, a distance of 35.47 feet to a point on the East right-of-way line of the 60.0 feet right-of-way for Orient Road for a point of beginning; thence

continue to run S-89°-14'-33"-E, along said South Boundary of the North 967.0 feet, a distance of 526.87 feet to a point; thence run S-00°-11'-46"-W, parallel to the West boundary of the East 1/2 of the N.E. 1/4 of section 2, a distance of 547.28 feet to a point of intersection with the Northerly right-of-way line of State Road No. 400; thence run S-49°-12'-56"-W, along said right-of-way line of State Road No. 400, a distance of 633.60 feet to a point of intersection with the East right-of-way line of Orient Road; thence run the following courses along the East right-of-way line of Orient Road, N-00°-00'-44"-W, a distance of 537.26 feet; thence S-89°-59'-16"-W , a distance of 22.0 feet; thence N-00°-00'-44"-W, a distance of 400.0 feet; thence S-39°-59'-16"-W,

distance of 23.0 feet; thence N-00°-00'-44"-W, a distance of 30.87 feet to the Point of Beginning. Containing 8.589320 Acres, more or less.

Said land having been transferred to the United States by Warranty Deed dated July 11, 1980.

/s/

Thomas W. Fredericks

BEFORE ME, Notary Public, and the undersigned competent witnesses in the place and date set out below, personally came and appeared Thomas Fredericks, as a representative of THE UNITED STATES OF AMERICA, duly authorized by the Act of

June 18, 1934, 48 Stat. 984, who does hereby acknowledge to have received from the seller the property above described, and who declares that he accepts said property for and on behalf of THE UNITED STATES, in trust, for the Seminole Indian Tribe of Florida, its successors and assigns forever.

THUS DONE AND PASSED Before me, Notary, and the undersigned conpetent witnesses, on this 16th day of Jan., 1981, at Washington, D.C.

/s/ Marilyn D Army
Notary

COMM. Exp. 8/31/83

/s/ James F. Canan
Witness

/s/
Witness